LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 16 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1071

CHARLES FARMER,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

J. NORRIS HARDING,
Assistant County Prosecutor,
for EDWARD J. DOLAN,
County Prosecutor of Middlesex County,
Attorney for Respondent,
County Administrative Building,
New Brunswick, New Jersey.

JOHN P. KOZAK,
Assistant County Prosecutor,
On the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF QUESTIONS PRESENTED	1
COUNTER-STATEMENT OF FACTS	1
ARGUMENT:	
I—	6
II—	6
CONCLUSION	10

Cases Cited

Downum v. United States, 372 U. S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963) 6, 7, 9

State v. Farmer, 45 N. J. 520, 213 A. 2d 249 (1965) ... 2, 9

State v. Sullivan, 33 N. J. Super. 138, 109 A. 2d 430 (App. Div. 1955) 4

United States v. Perez, 9 Wheat. 579, 6 L. Ed. 163 (1824) 7

United States v. Tateo, 277 U. S. 467, 12 L. Ed. 2d 448, 84 S. Ct. 1587 (1964) 9

Wade v. Hunter, 336 U. S. 684, 93 L. Ed. 974, 69 S. Ct. 834 (1949) 7

United States Constitution Cited

Fifth Amendment 1, 5, 6, 9

Fourteenth Amendment 1, 6

New Jersey Constitution Cited

Article 1, Section 11 5

The respondent, The State of New Jersey, presents herewith its answer to the petitioner's application for a writ of certiorari to review the judgment of the Supreme Court of New Jersey entered in the above-entitled cause on November 21, 1966.

Counter-Statement of Questions Presented

1. Is the double jeopardy provision of the Fifth Amendment to the Federal Constitution applicable to the several states by way of the Fourteenth Amendment to the Federal Constitution?

2. Was the trial court's declaration of a mistrial for a sufficient legal reason and an absolute or overriding necessity, thereby permitting retrial of the defendant without placing him again in jeopardy?

Counter-Statement of Facts

On September 18th, 1963, Barbara Farmer was shot and killed at her home in Highland Park, New Jersey. Her husband, the defendant herein, was subsequently indicted for the murder. After being adjudged incompetent to stand trial he was committed to the Vroom Building at the New Jersey State Hospital where he remained until May, 1965, when it was judicially determined that he had recovered his competency and was thus fully capable of standing trial.

The defendant now moved for pre-trial discovery on various aspects of the indictment and on August 2, 1965, Middlesex County Court Judge Samuel V. Convery granted the motion in precisely the terms and areas specified in the motion. Among these—and the only one which is presently of any concern—was the mandate that the defendant be allowed "to inspect, copy and photograph all statements, papers and confessions concerned with the within indictment." The State's application for leave to appeal from

Judge Convery's decision was denied by the Supreme Court, *State* v. *Farmer,* 45 N. J. 520, 213 A. 2d 249 (1965) and the State proceeded, in its judgment, to comply fully with Judge Convery's order.

Juror interrogation began on January 4, 1966, but prior to completion a mistrial was declared, with the consent of both parties, because of possible jury contamination. Retrial was scheduled for January 17th, 1966, when jury selection again commenced, the State seeking the death penalty. On January 31, 1966, a full complement of fourteen jurors had been impanelled and actual trial of the merits was scheduled for February 1, 1966.

Prior to the presentation of any witnesses, however, the assistant prosecutor trying the case sought a ruling from Middlesex County Court Judge John B. Molineux, presiding over the trial, as to whether oral statements given by prospective witnesse to representatives of the State fell within the scope of paragraph (a) of Judge Convery's order, set forth at length hereinbefore. Respective counsel took obviously contrary positions and the Court ruled in favor of the State.

On February 3, 1966, Judge Molineux again declared a mistrial. A reasonable summary of the events and reasons which impelled the Court to exercise its discretion in aborting the trial as it did are as follows:

In the course of direct examination of Sgt. Earl F. Eichler of the Highland Park Police Department, the State sought to elicit testimony from him as to an apparently spontaneous comment made by the defendant at the scene of the homicide, while Sgt. Eichler was listening to Douglas Hague, an eyewitness to the shooting, narrating the events as he remembered them. Defendant's counsel objected and asked whether Eichler had a written report reflecting his

testimony, past and projected. The reply was affirmative. A full colloquy and argument then followed, the State informing counsel and the Court that it had in its possession not only Eichler's report but those of many other policemen and other officers, rendered subsequent to the homicide and pursuant to their services as guards during the defendant's confinement at St. Peter's Hospital for treatment of a self-inflicted wound in the shoulder.

Defendant's attorney demanded copies of all such reports, stating that they fell squarely within Judge Convery's pre-trial order for discovery. The State opposed the demand, maintaining that investigative and police reports were not within the scope of the order and that the order contemplated formal statements of persons other than the defendant, taken by members of the prosecutor's staff, and memoranda of oral statements by such other persons, prepared by members of the prosecutor's staff. All of these had been in counsel's hands for a substantial period before trial.

The trial court ruled, however, that the language of the order was so broad as to uphold the defendant's position and directed the State to furnish copies of all written reports made by policemen and other officers. Trial was recessed until the following morning to allow the State time in which to make copies of the reports available.

Mindful of the impact of the court's ruling and, as later conceded, that the language of the order was so broad as to cover, *in the abstract*, every conceivable document in the State's file, the State turned over to counsel every report and memorandum in its file. In effect, the contents were swept clean and made available in order to avoid recurrence of the pending situation.

At this point the respondent deems it important to note that during the voir dire and early on, counsel for the defendant demanded a list of all the State's prospective witnesses. The State resisted this, on the authority of *State* v. *Sullivan,* 33 N. J. Super. 138, 109 A. 2d 430 (App. Div. 1955), but the trial court ordered its production on the theory that prospective jurors might be acquainted with one or more of the witnesses to such an extent as might invoke a challenge for cause and, and the least, a peremptory challenge.

The transcript of the record at the trial will confirm that the names of all the police and sheriff's officers whose testimony was subsequently sought to be suppressed appeared on the list furnished the defendant pursuant to the court's order. This list remained in counsel's hands during the remainder of the time that juror interrogation continued.

On February 2, 1966, defendant's attorney moved to suppress the reports in question and the prospective oral testimony of the officers who had made them, on the ground that the State had deliberately violated Judge Convery's order for discovery and had, in effect, concealed the reports when it was under a direct obligation to reveal them. The State denied these charges and asserted that the most it could be accused of was misinterpretation, since police reports were never mentioned in argument before Judge Convery or before the New Jersey Supreme Court, where the general issue was discussed on the State's application for leave to appeal. Counsel conceded this fact, but nevertheless insisted upon suppression. The Court gave both sides the opportunity to research the law on the subject and recessed the trial to the following day.

After hearing exhaustive argument on February 3, 1966, the trial court concluded: 1) A delay of the trial to permit

the defendant to investigate the reports in question and produce countervailing testimony would not only be impractical but unfair to the defendant, no matter how much time was afforded; 2) the reports and oral testimony would not be suppressed because the court was convinced that the State had acted in good faith and had not deliberately concealed the reports in violation of the discovery order; further, to proceed without this testimony, which would form the very core of the State's case on the issue of sanity, would result in no meaningful trial; 3) under all the circumstances, fairness to both sides and the interests of justice dictated a mistrial, despite the objections of counsel on both sides and the extreme reluctance of the court.

In due course counsel for the defendant moved to dismiss the indictment, citing the double jeopardy provisions of Article 1, Section 11 of the New Jersey Constitution and the 5th Amendment to the Federal Constitution. On April 5, 1966, Judge Molineux filed a letter opinion wherein he denied the motion, ruling that retrial of the defendant would not result in fundamental unfairness to him. The defendant's application for leave to appeal followed, joined in by the State.

The Supreme Court of New Jersey granted leave to appeal, heard oral argument and subsequently affirmed the order of the trial court, holding that the factual circumstances presented did not warrant the invocation of the double jeopardy provisions of either the Federal or State constitutions.

The matter now comes before this Honorable Court on the defendant's petition for a writ of certiorari to the Supreme Court of New Jersey.

ARGUMENT

I.

The respondent is of the opinion that the 5th amendment to the Federal constitution is indeed applicable to the several states by virtue of the 14th amendment to that constitution. Accordingly the respondent joins in and agrees with the petitioners argument under Point I of its petition on the foregoing issue.

II.

The only substantive question before this Court relating to the factual situations faced by the tribunals below is whether the prosecutor's misapprehension as to the scope of a preliminary order for discovery provides sufficient reason for allowance of the petitioner's writ.

As noted by the New Jersey Supreme Court no approximately comparable factual circumstances were available for its guidance and the same is true today.

On the other hand the petitioner asserts that if the events in *Downum* v. *United States,* 372 U. S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963) warranted this Court's intercession, then its attention is even more urgently required here. Comparison of the two cases does not support that contention.

First, the prosecutor in *Downum requested* mistrial over the defendant's objections. In the cause at bar the prosecutor no more wanted a mistrial than did the petitioner. Even so, in the face of this significant action by the prosecutor in *Downum,* four members of this Court considered that the circumstances which led to the prosecutor's request were such as constituted harmless error. In addition, it was emphasized by the minority that the

trial itself had not actually got under way. Hence, the minority indicated that the prosecutor's and trial court's actions did not go beyond the flexibility so clearly called for by the pronouncements in *United States* v. *Perez,* 9 Wheat. 579, 6 L. Ed. 163 (1824) and *Wade* v. *Hunter,* 336 U. S. 684, 93 L. Ed. 974, 69 S. Ct. 834 (1949).

The majority in *Downum* of course, was of another mind and imposed upon the prosecution the severest of all penalties available, one which, in our judgment, would be untenable here.

Pursuing this thought, our second emphasis is directed to the fact, stressed also by the court below, that the actual trial had only barely commenced. The only testimony heard until the abrupt cessation which followed was purely of a preliminary nature. The prosecution, in other words, had just begun to set the scene and went no further. Accordingly, we consider it fair to say that progress of the trial to that point had not exposed the defendant to anguish of mind and body in any degree greater than that experienced by him during a two-week period of juror interrogation.

The third differentiation which we perceive between *Downum* and this case is referred to in our Counterstatement of Facts, namely, the disclosure to counsel for the petitioner, during interrogation of prospective jurors, of every witness which the State intended to have on call or produce for testimony on both its case in chief and on such rebuttal as would relate to the issue of insanity. Thus, counsel was then on notice, well in advance of impanellment of the jury and the formal presentation of evidence by the State, that the respondent might very well have in its possession reports and statements, rendered by those witnesses, which he later sought to suppress on the

ground that they had been intentionally withheld in violation of the discovery mandate.

At this juncture the respondent can do no better than quote an appropriate connective commentary on the subject by the New Jersey Supreme Court:

> "* * * Yet at no time during the two weeks of jury selection or after the introduction of testimony and exhibits began, until the impasse to be discussed later was reached, does the record reveal that he called this fact to the attention of the judge or made a motion that their statements, if any, be delivered to him, or that the suggestion was advanced that such statements were within of the discovery order * * *". (Appendix B, pp. 16a and 17a)

Candor requires the concession that this point was not raised before the trial court on the motion, post-mistrial, to dismiss the indictments on the ground of double jeopardy. It was, however, urged before the New Jersey Supreme Court. Its acceptance, therefore, established in the collctive mind of one unanimous reviewing court that the mistrial was not solely the respondent's fault. While there is a manifest obligation on the part of a prosecuting authority to conduct itself so as to avoid abortive termination of a criminal trial, a corresponding duty must perforce impose itself upon a defendant and counsel.

Thus, taking into consideration all the material facts, both active and passive, including the prosecution's unassailable protestation that its nondisclosure was not designed or wilfull, it should be clear that the mistrial was the creature of both the respondent and petitioner. In the case of the former, honest misinterpretation of a discovery order, viewed in the light of applicable New Jersey

decisional law, was the propellant; as to the petitioner, passivity in the face of information which commanded inquiry, was the cause. If this be accepted as declarative of the true situation, it does not allow for separation and focus on the prosecution as the sole producing agent of the mistrial.

The respondent finds it somewhat curious that the petitioner should cite *United States* v. *Tateo,* 277 U. S. 467, 12 L. Ed. 2d 448, 84 S. Ct. 1587 (1964), even though it be only for the purpose of stressing this Court's distinction of *Downum* from *Tateo.* We say this because the facts in *Tateo,* in our judgment at least, would appear to lean toward the defendant in that case; and yet this Court found, albeit by a split decision, that retrial there would not violate the Fifth Amendment's stricture against double jeopardy.

The fundamental distinction between *Tateo* and *Downum* and now *Farmer* is aptly stated by the petitioner, quoting from *Tateo* on page 11 of his petition:

> "* * * There the court held that when a jury is discharged because the prosecution is not ready to go forward with its case, the accused may not then be tried before another jury. * * *".

If the meaning of *Downum* is indeed so confined, the decision has no impact in the present case.

CONCLUSION

The decisional law examined provides no basis for intercession by this Court in this matter, especially in sight of the facts as found by the New Jersey Supreme Court. The respondent respectfully requests, therefore, that the petition for certiorari be denied.

Respectfully submitted,

J. NORRIS HARDING,
Assistant County Prosecutor,
for EDWARD J. DOLAN,
County Prosecutor of Middlesex County,
Attorney for Respondent, the State of New Jersey.

JOHN P. KOZAK,
Assistant County Prosecutor,
On the Brief.